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Federal Communications Commission

WASHINGTON, D.C.

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Federal Communications Commission  
Office of the Secretary

In re Petition for Declaratory	)	MMB File No. 910221A
Ruling that Lenders May Take a	)	
Limited Security Interest	)	
in an FCC License	)	

To: The Commission

JOINT REPLY COMMENTS ON PETITION FOR DECLARATORY RULING

Capstar Communications, Inc.; Command Communications, Inc.;  
Jones Eastern Broadcasting, Inc.; Legacy Broadcasting, Inc.;  
Liggett Broadcast, Inc.; and Sinclair Broadcast Group, Inc.  
(hereinafter collectively referenced as the "Companies"), by  
their attorneys, hereby jointly submit these reply comments on  
the Petition for Declaratory Ruling ("Petition") filed on  
February 21, 1991 by the law firm of Hogan & Hartson, which seeks  
a declaratory ruling that a third-party creditor may take a  
limited security interest in an FCC license. As set forth  
herein, none of the various commenters supporting the Petition  
have offered either a legal argument sufficient to support the  
Commission's authority to afford the relief the Petition  
requests, or a sufficient policy justification for the radical  
alteration of established Commission policy they support.

INTRODUCTION

1. It is apparent, from a review of the comments filed on  
the Petition, that the Companies stand alone. Their Joint  
Comments appear to be the only ones filed in this proceeding that

oppose the concept of granting security interests in Commission licenses. This fact, however, does not and should not lead to any conclusion that the Petition's requested relief is either permissible as a matter of law or desirable as a matter of policy.

2. As to the threshold question of whether the Communications Act of 1934, as amended (the "Act"), allows the Commission to permit security interests in licenses it issues, the Companies note only that none of the commenters provides a new or persuasive legal argument that the Act grants such authority. Instead, to the extent they supply any legal argument at all, the commenters basically echo the faulty arguments set forth in the Petition itself. The Companies have already discussed the legal aspects of the Petition in their initial Joint Comments, and have demonstrated that the Commission simply has no authority to afford the Petition's requested relief, as security interests in FCC licenses are clearly property interests of the sort squarely prohibited by the Act. No effective refutation of this fundamental truth can be found in any of the comments supporting the creation of such an interest.

3. Since the Companies have already discussed in detail the legal obstacles to a grant of the Petition, they will not discuss them further herein. Rather, these reply comments will address the major thrust of the supporting comments -- that security interests in Commission licenses would be beneficial and should therefore be permitted. As to this proposition, this proceeding is an instance where silence is damning. Among the

broadcast operators who supposedly will be the only parties to reap a public interest benefit from lenders' ability to take security interests in licenses, there is not one who has voiced its support for the Petition. Surely, if licensees believed that permitting a security interest to be taken in a license would "jump start" the broadcast finance industry, they would have filed comments in support of the Petition. Those who have supported the Petition -- mainly lenders who would always welcome additional security interests in a borrower's assets -- can provide absolutely no colorable justification for the relief the Petition requests. Since the Commission has no record basis or power to rewrite the Act as the Petition proposes, the Commission may not do so.

#### DISCUSSION

##### **I. There Is Absolutely No Basis in the Record for Granting the Petition**

4. Of all the comments filed in response to the Petition, the Companies' Joint Comments represented the only comments filed by entities actually in the business of operating broadcast stations. In other words, the Companies were the only commenters which themselves hold (directly or through subsidiaries) the FCC licenses that are the subject of this proceeding.

5. By far, the vast bulk of initial commenters were lenders -- banks and other institutions in the business of providing acquisition/operation capital to broadcasters and other communications entities. The commenters also included a handful of law firms proclaiming to represent both financing entities

and/or FCC licensees. Most of these commenters basically expressed the notion that security interests in FCC licenses should be allowed "because they are a good thing" for lenders and licensees alike.<sup>1/</sup> Specifically, many commenters paid lip service to the general idea that permitting security interests in licenses would increase lenders' confidence in the broadcast industry as an investment, thus giving lenders more incentive to make financing available to existing and would-be operators. This, the lenders argued, would be good for stations since not only would more stations be able to improve their facilities or, at a minimum, stay on the air, but smaller entities (including minority controlled ones) would be able to break into the broadcast business. Some lenders even seek to speak for the broadcast industry, advancing the "level playing field" argument that lenders' inability to obtain security interests in licenses have impaired the broadcast industry's ability to compete for lending dollars with other industries.<sup>2/</sup>

6. It is not surprising that lending institutions would support a proposal that would allow them to take security interests in FCC licenses. After all, given that such a proposal would permit lenders to take security in an item heretofore off limits to them, it would be strange indeed to see any financing entity fail to support the concept. What is interesting is that, notwithstanding the commenting lenders' proclamations of concern

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<sup>1/</sup> However, none of the commenters mention any specific licensees that might benefit.

<sup>2/</sup> See Comments of The First National Bank of Boston at 2; Comments of Canadian Imperial Bank of Commerce at 2.

and benefit for broadcasters, not a single existing or would-be operator of a broadcast station filed comments in support of the Petition. Given the substantial harm that the commenters perceive as occurring in the broadcast industry by virtue of lenders' inability to obtain security interests in licenses, it is truly amazing that the only members of that industry who filed comments in this proceeding opposed permitting such interests.

7. Moreover, while the commenters -- most of them financial institutions -- speak in general terms of lenders' "uncertainty" and "lack of confidence," and of a "chilling effect" on broadcast financing, not one of these commenters cites a single instance in which a lender has refused to finance a broadcast transaction solely because it could not take a security interest in the FCC license involved. Nor did any commenting financial institution point to a single instance in which it has suffered any type of harm by its inability to take such an interest. Thus, even if the Commission had the statutory authority to allow lenders to take security interests in the licenses it issues, there is no basis in the record of this proceeding -- save for conclusory and speculative statements -- on which to do so.

**II. The Real Concern of the Commenters -- That a Lender Would Not Be Able to Retrieve a Station's Going Concern Value in Case of a Bankruptcy -- Is Unfounded**

8. As discussed above, there is no cognizable support in the record that either lenders or broadcast stations have suffered from the prohibition of security interests in licenses.

However, even if such a basis existed, it is apparent from the comments that the true concern of lenders is not the health of the broadcast industry. Instead, what motivates the commenters is a quite specific fear -- not a fear that financing any broadcast transaction is inherently a risky venture, but a fear that if a given station it has financed fails and goes into bankruptcy, the lender will not be able to be made whole because it will be not be secured to the full "going concern," or "Intangible Operating,"<sup>3/</sup> value of the station.

9. This concern is apparent from the fact that a substantial number of commenters<sup>4/</sup> pointed to the recent bankruptcy court decision in In re Oklahoma City Broadcasting Co.<sup>5/</sup> To these commenters, Oklahoma City represents a blanket holding that (1) the intangible "going concern" value of a station must always be attributed to the station's FCC license, and therefore (2) because lenders cannot take a security interest in an FCC license, lenders can never have any security interest in the value of a station as a going concern. Oklahoma City, according to many commenters, has thus had a "chilling effect" on the willingness of financial institutions to make broadcast

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<sup>3/</sup> See Comments of Heller Financial, Inc., at 3.

<sup>4/</sup> See, e.g., Comments of American Security Bank at 1; Comments of Semmes, Bowen & Semmes at 3; Comments of General Electric Capital Corporation at 2 & n.1; Comments of Broadcast Trustee Management, Inc. at 5; Comments of O'Melveny & Myers at 2-3; Comments of Heller Financial, Inc. at 4, 12-15; Comments of Morrison & Foerster at 4; Comments of Ameritrust Company National Association et al. at 6-8; Comments of Bank of America at 2; Comments of Santarelli, Smith & Carroccio at 3 & n.1; Comments of Burr, Egan, Deleage & Co. at 3.

<sup>5/</sup> 112 B.R. 425 (Bkrcty. W.D. Okla. 1990).

loans, because lenders supposedly can no longer rely on being secured for the going concern value of the station.

10. Lest the apparent panic over the Oklahoma City decision receive more weight than it deserves, it is instructive to dispel two myths in the commenters' construction of that case. First, it is simply not correct that the intangible, or "going concern" value, of a broadcast facility (i.e., its capability to generate earnings in the future) must, or even can be equated with the value of the facility's FCC authorization. At least one commenting lending institution concedes that

while the license permits the future cash flows to be produced, they are not one and the same thing.  
(Indeed, if an FCC license and future earnings were equivalent, that is, if the license assured future earnings, the present problem would not arise in the first place because licensees would rarely default or seek bankruptcy protection.)<sup>6/</sup>

11. There can be no disputing the proposition that a broadcast station -- at least one that will continue to operate -- has an intangible value as a going concern. However, there has never been any question that this value can serve as security for a debt without the need to take a security interest in the license -- a separate and distinct component. While the Companies are not experts in bankruptcy law, they note that: (1) the Commission has for years allowed lenders to take security interests in the "going concern" value of stations even though a security interest in the license was not allowed; and (2) to the extent the court in Oklahoma City ruled that such "going concern"

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<sup>6/</sup> Comments of Heller Financial, Inc. at 18 (first emphasis added; second in original).

value must be attributed to the license itself, the Commission is not obliged to accept that interpretation.

12. Quite simply, to the extent that commenters are concerned about the inability to be secured for the "going concern" value of stations, the Commission can assuage that concern without permitting statutorily prohibited security interests in FCC licenses. Recognizing this, at least one commenter requests, as an alternative to the relief sought by the Petition, a simple clarifying ruling by the Commission that a lender can assert a security interest "in the entire value of the licensee as a going concern, including the Intangible Operating Value of the license."<sup>7/</sup> This latter form of relief is all that is necessary, and would do nothing more than reaffirm what has been Commission policy for years.

13. Second, any concern that Oklahoma City holds, as a general matter, that a lender may not have a security interest in the value of a station as a going concern is simply misplaced, as that case is limited to its facts. In that case, it was not proposed that the bankrupt station would continue operating, but instead that the station's operation would be discontinued and its license returned to the Commission. The secured creditor, therefore, could not have a security interest in the going concern value of the station -- for the simple reason that the station had no going concern value. Oklahoma City thus is not a new and disturbing holding that the intangible going concern value of a station cannot be secured. Instead, it is a common-

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<sup>7/</sup> Comments of Heller Financial, Inc. at 38.



sense ruling that a secured creditor cannot realize that value where it does not exist, and the ruling has no applicability whatsoever in the normal case, where a station will continue to operate.

14. In short, the real concern of the commenting financial institutions is that they will end up undersecured in the event a station goes bankrupt. There is, however, absolutely no basis for such a concern, and even if there were, such a concern certainly can be addressed without taking the radical (and unlawful) step of allowing security interests in an FCC license. All the Commission need do is clarify that the intangible "going concern" value of a station can be subjected to a security interest, as has always been the case. Any other step would be unnecessary as well as impermissible.

#### CONCLUSION

The Companies have already shown that the Commission is prohibited by the Communications Act from allowing a lender to take a security interest in an FCC license, even if there were every policy reason in the world for doing so. As these reply comments demonstrate, however, there is no policy reason supporting such an action and none of the broadcasters who would supposedly benefit so greatly from it have expressed support for it in this proceeding. Moreover, none of the many lending institutions and other parties who have lined up to support the Petition are able to provide any concrete and cognizable justification for such an action. The Commission's choice,

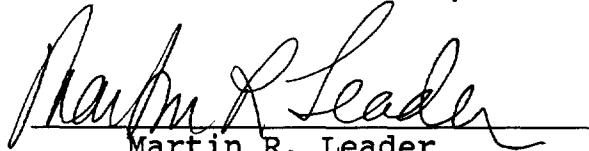
therefore, is clear. It must deny the Petition and refuse the relief requested therein.

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A handwritten signature in dark ink, appearing to read "Martin R. Leader", is written over a horizontal line.

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Dated: May 7, 1991

CERTIFICATE OF SERVICE

I, Valerie A. Mack, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "JOINT REPLY COMMENTS ON PETITION FOR DECLARATORY RULING" were sent this 7th day of May, 1991, by first class United States mail, postage prepaid, to the following:

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